Supreme Court, U.S.
FILED
MAR 31 1994
OFFICE OF THE CLERK

Nos. 93-1361 and 93-1389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DREXEL BURNHAM LAMBERT GROUP INC. AND REFCO, INC.,
Petitioners,
v.
THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES

HAROLD BARRY VASIOS
Counsel of Record
ANJALI G. ASNANEE
ELIZABETH A. BERNEY
GILBERT, SEGALL AND YOUNG
430 Park Avenue
New York, NY 10022
(212) 644-4000
Attorneys for Respondent The Emirate of Dubai, United Arab Emirates

March 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the commercial activities exception, 28 U.S.C. § 1605(a)(2), in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (the "FSIA"), provides a basis for subject matter and personal jurisdiction in the courts of the United States with respect to claims asserted against a foreign state and its judicial and quasi-judicial agency, a Committee of Receivers created by a sovereign decree of the foreign state to conduct insolvency proceedings in the foreign state, where the act which forms the basis of the claims filed in the U.S. court is the quintessentially sovereign act of adjudicating claims filed in the foreign insolvency proceedings, and the sovereign act of adjudication bears, at best, an attenuated connection to unrelated commercial activities.

2. Whether the waiver exception in the FSIA, 28 U.S.C. § 1605(a)(1), permits a U.S. court to exercise subject matter and personal jurisdiction over a foreign state and its judicial and quasi-judicial agency or instrumentality, a Committee of Receivers created by a sovereign decree of the foreign state to conduct insolvency proceedings in the foreign state, where the Committee of Receivers participates in litigation in the United States only in a representative capacity on behalf of the insolvent estates of private entities, and asserted the defense of sovereign immunity in response to each and every attempt to assert a claim against the Committee of Receivers itself, and never expressly waived its immunity or evidenced a conscious decision to waive its immunity with respect to claims asserted against it.

PARTIES TO THE PROCEEDINGS

Respondents are the Emirate of Dubai, United Arab Emirates (the "Emirate") and the Committee of Receivers for A.W. Galadari, *et al.* (the "Committee"). The Emirate is a sovereign government which is a member of the United Arab Emirates and as such is a foreign state under the FSIA. The Committee is a judicial and quasi-judicial agency created by a sovereign decree of the Emirate to, *inter alia*, conduct insolvency proceedings in Dubai for the insolvent estates of A.W. Galadari ("Galadari") and his businesses, including A.W. Galadari Commodities ("Commodities") and A.W. Galadari Holdings (Private) Ltd. ("Holdings"). The Committee is also entitled to sovereign immunity under the FSIA.

Petitioners The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco") were plaintiffs in two cases which were consolidated, both on appeal in the Court of Appeals for the Second Circuit (the "Court of Appeals") and in the United States District Court for the Southern District of New York (the "District Court"). Defendants Galadari, Commodities and Holdings were not parties to the appeal to the Court of Appeals and are not parties in this Court.

Petitioners Drexel and Refco first named the Emirate and the Committee as defendants in the Supplemental and Amended Complaints (the "Supplemental Complaints") filed in 1992. The Court of Appeals dismissed the Supplemental Complaints against the Emirate and the Committee on the grounds of foreign sovereign immunity.

TABLE OF CONTENTS

	Page
COUNTER STATEMENT OF QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
COUNTER STATEMENT OF THE CASE	2
The Drexel and Refco Lawsuits Prior to the Filing in 1992 of the Supplemental Complaints	4
The Supplemental Complaint in the Drexel Action	8
The Supplemental Complaint in the Refco Action	9
REASONS WHY THE PETITIONS FOR CERTIORARI SHOULD BE DENIED	12
I. THE PETITIONS SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION WITH RESPECT TO THE "COMMERCIAL ACTIVITIES" EXCEPTION DOES NOT RAISE ANY SPECIAL OR IMPORTANT REASONS FOR REVIEW	12
A. The Court of Appeals Correctly Applied This Court's Recent Decisions in *Saudi Arabia v. Nelson* and *Argentina v. Weltover, Inc.*	12
B. The Court of Appeals Correctly Construed the Third Clause of the Commercial Activities Exception	14
C. There Is No Conflict Among the Circuit Courts of Appeals	16

TABLE OF CONTENTS—Continued

Page

II. THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI WITH RESPECT TO THE WAIVER ISSUE 18

A. There Is No Conflict Among the Circuit Courts of Appeals as to the Legal Standard to Be Applied 18

B. The Court of Appeals Correctly Construed the Implied Waiver Language of § 1605(a)(1) and Correctly Applied the Well-Recognized Legal Standard to Undisputed Facts 19

III. THE PETITIONS SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION CAN BE SUSTAINED ON OTHER ALTERNATIVE GROUNDS 20

A. The Act of State Doctrine Bars Petitioners' Claims 21

B. Petitioners' Claims Are Barred by the Doctrine of Judicial Immunity 22

C. The Emirate Was Not the "Alter Ego" of the Committee 23

D. Claims of Misrepresentation, Abuse of Process or Interference with Contractual Rights Are Barred by 28 U.S.C. § 1605(a)(5)(B) .. 24

E. Claims Based on the Exercise of Discretion by the Committee Are Barred by 28 U.S.C. § 1605(a)(5)(A) 24

F. The Takings Exception to the FSIA Is Not Applicable 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases Page

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 21
Allied Bank Int'l v. Banco Credito Agricola, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985) 21
Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980) 16
Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986) .. 22
Asociacian de Reclamantes v. United Mexican States, 561 F. Supp. 1190 (D.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) 22
Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398 (1964) 22
Butz v. Economou, 438 U.S. 478 (1978) 22
Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 727 F.2d 274 (2d Cir. 1984) 18
Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 274 (2d Cir. 1984) 25
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 477 F. Supp. 615 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 786 (2d Cir. 1980), *cert. denied*, 469 U.S. 1087 (1984) 19, 20
Drexel Burnham Lambert Group Inc. v. Galadari, No. 84 Civ. 2602, 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987) 4, 6, 7, 25, 26
Drexel Burnham Lambert Group Inc. v. Galadari, 127 B.R. 87 (S.D.N.Y. 1991) 7
Drexel Burnham Lambert Group Inc. v. Galadari, 610 F. Supp. 114 (S.D.N.Y.), *aff'd in part and vacated in part*, 777 F.2d 877 (2d Cir. 1985) 5
Drexel Burnham Lambert Group Inc. v. Galadari, 134 B.R. 719 (S.D.N.Y. 1991) 7
Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3rd Cir. 1993) 16, 17
First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 10, 20, 23

TABLE OF AUTHORITIES—Continued

Page

Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 16, 18, 19, 23
Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) 18, 19
Goodsons & Co. v. Federal Republic of Nigeria, 558 F. Supp. 1204 (S.D.N.Y. 1983) 24
Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989) 24
Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987) 23
Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170 (5th Cir. 1989) 23
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 24
Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) 18
Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) 23
Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879 (D.C. Cir. 1988) 16
Preston v. United States, 596 F.2d 232 (7th Cir.), *cert. denied*, 444 U.S. 915 (1979) 24
Refco, Inc. v. Galadari, 755 F. Supp. 79 (S.D.N.Y. 1991) 6, 7
Republic of Argentina v. Weltover, Inc., —— U.S. ——, 112 S. Ct. 2160 (1992) 12, 13, 14, 16
Saudi Arabia v. Nelson, —— U.S. ——, 113 S. Ct. 1471 (1993) 2, 12, 13, 14, 16, 24
Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A., 601 F. Supp. 457 (S.D. Fla. 1984), *rev'd on other grounds*, 792 F.2d 989 (11th Cir. 1986) 19, 20
Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991) 18, 19
Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1812 (1993) 17, 18, 19, 25
Stena Rederi A.B. v. Petroleos Mexicanos, 923 F.2d 380 (5th Cir. 1991) 17

TABLE OF AUTHORITIES—Continued

	Page
Stump v. Sparkman, 435 U.S. 349 (1978)	22
Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968)	22
Underhill v. Hernandez, 168 U.S. 250 (1897)	21
Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993)	17
W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990)	21
Winslow v. Romer, 759 F. Supp. 670 (D. Colo. 1991)	22
Statutes	
28 U.S.C. § 1254(1) (1993)	1
28 U.S.C. § 1441(d) (1973)	7
28 U.S.C. § 1602, *et seq.* (Supp. 1993)	i
28 U.S.C. § 1603(d) (Supp. 1993)	13
28 U.S.C. § 1605(a)(1) (Supp. 1993)	i, 10, 18, 19, 20
28 U.S.C. § 1605(a)(2) (Supp. 1993)	*passim*
28 U.S.C. § 1605(a)(3) (Supp. 1993)	25
28 U.S.C. § 1605(a)(5)(A) (Supp. 1993)	24, 25
28 U.S.C. § 1605(a)(5)(B) (Supp. 1993)	24
28 U.S.C. § 2401(b) (Supp. 1994)	24
28 U.S.C. § 2680(a) (1965)	24
N.Y. Civ. Prac. L. & R. § 213.1 (McKinney's 1990)	24
N.Y. Civ. Prac. L. & R. § 214.4 (McKinney's 1990)	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Nos. 93-1361 and 93-1389

THE DREXEL BURNHAM LAMBERT GROUP INC. AND REFCO, INC.,

Petitioners,

v.

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES

Respondent Emirate respectfully requests that this Court deny the separate petitions of Drexel and Refco (hereinafter collectively referred to as "Petitioners") for a writ of certiorari seeking review of the decision of the Court of Appeals in this case (the "Court of Appeals Decision").

JURISDICTION

Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1). However, it is the contention of Respondent Emirate that the courts of the United States lack subject matter and personal jurisdiction over it because the Emirate is a foreign state entitled to sovereign immunity

under the FSIA. The FSIA is the exclusive basis for personal and subject matter jurisdiction in actions against foreign states. *Saudi Arabia v. Nelson*, —— U.S. ——, 113 S. Ct. 1471, 1476 (1993).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in Refco's petition ("Refco Pet.") at 2-3 and in Drexel's petition ("Drexel Pet.") at 2-3. Additional statutory provisions that are involved are set forth in the Appendix hereto ("EA") at 1a-3a.

COUNTER STATEMENT OF THE CASE

The Emirate submits this counter statement of facts to correct misstatements and distortions contained in the petitions filed by Drexel and Refco.

The *Drexel* and *Refco* actions involve an attempt by Petitioners to shift liability for private debts for commodities trading losses owed to Petitioners by the insolvent estates of Galadari and Commodities to Respondents Emirate, a foreign state, and the Committee, a separate juridical entity which is an independent, judicial and quasi-judicial agency or instrumentality of the Emirate. The Committee was created by Emirate Decree No. 3 of 1984 (the "1984 Decree") to conduct insolvency proceedings in Dubai with respect to the insolvent estates of Galadari, Commodities and other Galadari entities (hereinafter the "Dubai insolvency proceedings"). EA 4a-13a.

Contrary to Petitioners' assertions [1], neither the *Drexel* nor the *Refco* case involves the repudiation of debts by either the Committee or the Emirate, neither of which was obligated in any way to Petitioners for the debts of Galadari or Commodities. Rather, as found by the Court of Appeals, the gravamen of Petitioners' claims against the Committee (and the Emirate as the alleged "alter

---

[1] *E.g.*, Drexel Pet. at 19; Refco Pet. at 9, 15.

ego" of the Committee) is the Committee's adjudication, in April 1991, of claims filed by Drexel and Refco in the Galadari insolvency proceedings. *See* Appendices to Drexel's and Refco's petitions (hereinafter "PA"), 25a.[2] Petitioners' claims against Galadari and Commodities were *allowed* by the Committee, but remain unpaid because those insolvent estates lack sufficient funds to pay the claims.

Therefore, the core of the dispute is (1) the Committee's adjudication which denied Petitioners' claims that another Galadari entity, Holdings, was responsible for the debts of Commodities, and (2) additionally, in Drexel's case, the Committee's denial of Drexel's claim that it had a valid security interest in certain shares of the Union Bank of the Middle East (the "UBME"), which were purportedly pledged to Drexel by Galadari. Thus, the "acts" upon which this litigation is based are *sovereign acts, i.e.* the adjudication by the Committee, a quasi-judicial agency of the Emirate, of claims filed in the Galadari insolvency proceedings in Dubai, which adjudication was undertaken pursuant to authority granted by sovereign decree.

Nor is this a case in which the Committee or the Emirate waived its immunity under the FSIA. The Emirate had *no* involvement in either lawsuit until it was added as a defendant *in 1992* and then it immediately moved to dismiss on the grounds of sovereign immunity under the FSIA. The Committee's involvement in the Drexel and Refco litigation was as the *representative* of the insolvency estates of non-immune defendants Galadari and Commodities. Each time a claim was asserted against the Committee *qua* Committee, it duly asserted sovereign immunity. This was confirmed by the Court of Appeals which, applying the well-recognized legal standard that implied waivers are to be "narrowly construed", held that

---

[2] The page numbers of the Court of Appeals decision in the Appendices to both petitions are identical.

there was no waiver of immunity by the Committee (and thus no waiver by the Emirate, the Committee's alleged "alter ego"). PA 15a-21a.

The Drexel and Refco Lawsuits Prior to the Filing in 1992 of the Supplemental Complaints.

Drexel and Refco initiated their lawsuits in New York in 1984 as simple actions to collect on contractual obligations owed to them by Galadari and Commodities.[3] Neither the Emirate nor the Committee was involved in the creation of the obligations of Galadari or Commodities, nor were they named as defendants in the original complaints filed in 1984. PA 5a, 7a.

Galadari had operated a vast business and financial empire centered in Dubai, including construction, financial services, hotels and other businesses. By late 1983, Galadari and the various companies he controlled were insolvent. In order to forestall financial catastrophe in Dubai and the surrounding region, the Emirate undertook a series of sovereign acts. *Drexel Burnham Lambert Group Inc. v. Galadari*, No. 84 Civ. 2602, 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987) ("*Drexel IV*"), at 3-7.[4] In November 1983, by Decree No. 5 of 1983, the Emirate created a Provisional Board of Directors to take charge of the operations of the UBME, a Galadari-controlled bank chartered in Dubai which was on the

[3] Drexel commenced its action in the United States District Court for the Southern District of New York against Galadari and Commodities for breach of their written obligations to repay commodities trading losses. Damages in the amount of $12.6 million, plus interest, were sought. Refco commenced its action against Galadari and Commodities in New York State Court, in 1984, seeking damages for breach of written obligations to repay commodities trading losses in the range of $4.5 million, plus interest. PA 5a, 7a.

[4] *Drexel IV* contains the District Court's 1987 findings of facts and conclusions of law, which detail the factual background to the Galadari insolvency and the creation of the Committee pursuant to the 1984 Decree.

brink of failure. The Provisional Board for a short time was given control of Galadari's banking and non-banking assets. When a moratorium on the payment of the debts of Galadari and his companies failed because of the prosecution of individual actions by creditors, the Emirate, which lacked any bankruptcy code and dealt with bankruptcies on an *ad hoc* basis, issued the 1984 Decree which created an orderly insolvency procedure whereby the Committee would marshal the assets of Galadari and his companies and adjudicate claims (subject to review in a special court created for that purpose). PA 4a. The Emirate also paid over to the Committee far more than fair value for the approximately 80% of the UBME shares which it unilaterally acquired.[5] The Committee, in turn, paid compensation for the UBME shares to those persons filing claims who could prove their entitlement thereto. Also, pursuant to the 1984 Decree, all cases pending in the Dubai courts against Galadari and his companies were stayed and those claims were required to be filed with the Committee. EA 11a.

Both New York lawsuits against Galadari and Commodities came to a halt following the institution of the Galadari insolvency proceedings. The Committee, in *its capacity as representative* of and on behalf of the insolvency estates of Galadari and Commodities, moved to stay or dismiss the Drexel action in 1984 on the grounds of comity so that Drexel would file its claim against Galadari and Commodities in the Dubai insolvency proceedings.[6] *Drexel Burnham Lambert Group Inc. v. Galadari*, 610 F. Supp. 114 (S.D.N.Y.), *aff'd in part and vacated in part*, 777 F.2d 877 (2d Cir. 1985). The District Court initially dismissed the Drexel action. On

---

[5] *See* note 23, *infra*.

[6] There was no claim asserted against the Committee at that time and thus no basis for the Committee to assert sovereign immunity. The only claims made were on the private debts of Galadari and Commodities, both non-immune defendants.

appeal, the Second Circuit Court of Appeals vacated the dismissal and remanded the case for factual findings. On remand, the District Court made detailed findings of fact and entered a stay in 1987 on the grounds of comity on the basis that "the Galadari Bankruptcy Decree and proceedings [in Dubai] are consonant with our notions of fairness and due process". *Drexel IV* at 28.

In the *Refco* action, the Committee, *also in its capacity as representative of the estates of Galadari and Commodities*, opposed a motion for attachment of Galadari assets located in New York City. PA 7a. When the New York State Court, *sua sponte*, added the Committee as an additional defendant, the Committee immediately filed a motion to dismiss on the grounds of sovereign immunity. The motion was later withdrawn without prejudice, as the parties agreed to a series of adjournments of the New York State Court action in order that Refco would file and pursue its claims in the Dubai insolvency proceedings.[7] *See Refco, Inc. v. Galadari*, 755 F. Supp. 79, 80 (S.D.N.Y. 1991).

With the New York lawsuits at a standstill, both Drexel and Refco filed proofs of claim in the Dubai insolvency proceedings. Those proofs of claim included the contractual claims against Galadari and Commodities, and an additional claim against Holdings asserting that Commodities was a division of Holdings and that Holdings, which had no contractual relationship with Petitioners, was therefore responsible for the debts of Commodities. This was significant because the insolvent estate of Holdings contained sufficient assets to pay in excess of 80% of Petitioners' claims if allowed against Holdings, while the Galadari and Commodities estates had insufficient assets to satisfy allowed claims. No claim against Holdings had previously been raised in the New York litigation.

---

[7] When the Committee later filed its answer, it included sovereign immunity as a defense. PA 8a.

Both Refco and Drexel prosecuted their claims in the Dubai insolvency proceedings. Hearings were held and submissions were made to the Committee. When no decision had been made on its claims in the Dubai insolvency proceedings by 1990, Refco refused to give a further adjournment in the New York State Court action. At that point, the Committee removed the New York State Court action to the District Court pursuant to 28 U.S.C. § 1441(d). *Refco*, 755 F. Supp. at 81. The District Court then consolidated the *Refco* and *Drexel* actions and extended its stay of the *Drexel* action to the *Refco* action. *Id.* at 84. However, by early 1991, when there had been no decision on Drexel's and Refco's claims in the Dubai insolvency proceedings, both moved to lift the stay so that they could pursue their claims in the District Court. The District Court initially ruled that unless the Committee rendered a decision by April 16, 1991, it would lift the stay.[8]

In April 1991, the Committee issued a comprehensive decision on the claims of Drexel and Refco in the Dubai insolvency proceedings. The Committee *allowed* Drexel's and Refco's claims against Galadari and Commodities, but disallowed the claims against Holdings on the basis, *inter alia*, that it was not responsible for the debts of Galadari or Commodities. In addition, the Committee disallowed Drexel's claim that Galadari's obligation to it was secured by 6,068,640 UBME shares allegedly pledged to it by Galadari.[9]

In June 1991, the District Court lifted the stay on the grounds that the Dubai insolvency proceedings were no

---

[8] *Drexel Burnham Lambert Group Inc. v. Galadari*, 127 B.R. 87, 107 (S.D.N.Y. 1991); *Drexel Burnham Lambert Group Inc. v. Galadari*, 134 B.R. 719, 728 (S.D.N.Y. 1991).

[9] This result had been foreseen to a large degree by the District Court in its 1987 findings of fact and conclusions of law entered at the time the *Drexel* action was stayed. *Drexel IV* at 25-27, findings of fact nos. 41-51. *See also infra* note 23.

longer entitled to comity recognition because the Committee did not conduct those proceedings in conformity with U.S. notions of fairness. PA 9a. Thus, Petitioners were free to pursue their claims against Galadari and Commodities in the District Court.

In early 1992, recognizing that Galadari and Commodities had insufficient assets to satisfy their claims and in search of a deep pocket,[10] Drexel and Refco amended their complaints to add the Emirate and the Committee as defendants and to assert entirely new claims against them. The Supplemental Complaints focused primarily on the Committee's activities, especially in reviewing and adjudicating the claims of Drexel and Refco in 1991. In May 1992, the Emirate was served with the Supplemental Complaints making it a party for the first time.

The Supplemental Complaint in the Drexel Action.

The Drexel Supplemental Complaint asserts one claim against Galadari and Commodities for breach of a written contract and four claims against the Emirate and the Committee. As the Court of Appeals found, all the claims asserted against the Emirate were based on the Committee's adjudication of Petitioners' claims in the Dubai insolvency proceeding. PA 24a-25a. Drexel sought to attribute these acts to the Emirate on an agent-principal or "alter ego" theory.[11]

---

[10] In an affidavit submitted in support of its motion to amend the complaint, counsel for Drexel admitted that the Emirate was being joined as a defendant because it believed that the Emirate had sufficient assets in the United States to pay Drexel's claims.

[11] The only claim asserted against the Emirate directly in either Supplemental Complaint was Drexel's Third Claim for a purported taking of its alleged security interest in certain UBME shares as a result of the Emirate's unilateral acquisition of approximately 80% of the outstanding UBME shares in 1983. Drexel's position in the courts below was that this claim did not come to fruition until the Committee, acting in April 1991 in the Dubai insolvency proceedings, denied Drexel's claim for the proceeds of those shares

The Supplemental Complaint in the Refco Action.

The Refco Supplemental Complaint contains two claims against Galadari and Commodities for failure to repay their commodities trading debts, one claim against Holdings on the grounds that it is liable for the debts of Commodities, and three claims against the Committee and the Emirate (based on the acts of its alleged agent or alter ego, the Committee). Here again the Committee's acts in adjudicating Refco's claims in the Galadari insolvency proceedings were the essence of Refco's claims against the Committee and the Emirate. PA 24a-25a.

On August 24, 1992, the Emirate moved to dismiss both Supplemental Complaints on the grounds, *inter alia*, that the District Court lacked subject matter and personal jurisdiction under the FSIA because the Emirate is a "foreign state" within the meaning of the FSIA and because the acts complained of were public, governmental acts, and not within any of the FSIA exceptions to immunity. The Committee, as an "agency or instrumentality" of a foreign state, had also filed a motion to dismiss for lack of subject matter and personal jurisdiction.[12]

The record before the District Court on the motions to dismiss included the Supplemental Complaints, extensive

---

paid to the Committee by the Emirate for distribution to UBME shareholders who could prove their entitlement. Thus, *all* the claims made by Drexel and Refco against the Emirate are based on alleged acts of the Committee undertaken in the course of the Dubai insolvency proceedings.

[12] Both motions were consolidated for hearing and determination in the District Court. The Committee, as representative of the estates of Galadari and Commodities, filed answers on behalf of Galadari and Commodities. Neither the Committee nor the Emirate has ever filed a responsive pleading to the claims asserted against them in the Supplemental Complaints. Rather, both immediately moved to dismiss the Supplemental Complaints, *inter alia*, for lack of subject matter jurisdiction under the FSIA.

findings of fact made by the District Court in 1987 at the time it stayed the *Drexel* action and the record developed in 1991 after lengthy hearings on Refco's motion to lift the stay. The record also included declarations, sworn under penalty of perjury, from the Legal Advisor to the Ruler of Dubai concerning the creation and independence of the Committee, the relevant Emirate decrees, the Committee's thirty-three page decision adjudicating Petitioners' claims, various excerpts from minutes of Committee meetings, Declarations from members of the Committee, and other documents which detailed the background to the Committee's decision on Petitioners' claims in the Galadari insolvency proceedings in Dubai.

The District Court denied both the Emirate's and the Committee's motions to dismiss in its January 14, 1993, order. PA 12a. The District Court based jurisdiction on the exceptions to immunity set forth in 28 U.S.C. § 1605 (a)(1) (the waiver exception) and § 1605(a)(2) (the commercial activities exception). The District Court also found the Emirate responsible for the Committee's acts as the Committee's "alter ego" without making any findings of fact, thereby ignoring the long-recognized presumption of independence between a foreign state and its agency or instrumentality. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983) ("*Bancec*").

Thereafter, the Emirate and the Committee each filed timely appeals to the Court of Appeals under the collateral order doctrine which permits immediate appeal from orders denying motions to dismiss for lack of subject matter jurisdiction under the FSIA.

On November 29, 1993, the Court of Appeals, having reviewed the matter *de novo*, reversed the District Court and dismissed the Supplemental Complaints filed against both the Emirate and the Committee on the grounds that the District Court lacked subject matter and personal

jurisdiction under the FSIA. PA 1a-30a. The Court of Appeals, consistent with every Circuit Court of Appeals that has dealt with the issue, held that the implied waiver provisions of the FSIA must be "construed narrowly", and that there was no "unmistakable" and "unambiguous" waiver of FSIA immunity by the Committee (and none therefore by the Emirate as the purported "alter ego" of the Committee). PA 15a-21a. The Court of Appeals also held that the third clause of the commercial activities exception found in § 1605(a)(2) did not apply because Petitioners' claims were based on sovereign, immune acts:

> The "acts" upon which the claims of Drexel and Refco are "based" are essentially the adverse determination of their claims by the Committee, including the determination that Galadari had not effectively pledged [UBME] shares to Drexel as security for payment of the Note. . . .
>
> Neither the resolution of creditors' claims against the Galadari estate nor the determination of which [UBME] creditors held valid security interest in that bank constituted activity that could have been performed by private parties. Accordingly, § 1605 (a)(2) does not strip the Committee and the Emirate of FSIA immunity in this action.

PA 25a-27a.

REASONS WHY THE PETITIONS FOR CERTIORARI SHOULD BE DENIED

Nothing in Petitioners' applications to this Court establishes any special and important reasons for granting a petition for a writ of certiorari.

I. THE PETITIONS SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION WITH RESPECT TO THE "COMMERCIAL ACTIVITIES" EXCEPTION DOES NOT RAISE ANY SPECIAL OR IMPORTANT REASONS FOR REVIEW.

A. The Court of Appeals Correctly Applied This Court's Recent Decisions in *Saudi Arabia v. Nelson* and *Argentina v. Weltover, Inc.*

Certiorari should be denied because there is no need for this Court to revisit the commercial activities exception, 28 U.S.C. § 1605(a)(2), as this Court has issued two opinions in the last two years construing that exception. *Nelson, supra*; *Republic of Argentina v. Weltover, Inc.*, —— U.S. ——, 112 S. Ct. 2160, 2165 (1992).[13] Moreover, the Court of Appeals Decision is entirely consistent with both of these decisions.

As explained in *Nelson* and *Weltover*, the FSIA codifies the restrictive theory of foreign sovereign immunity under which "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in character (jure gestionis)." *Nelson*, 113 S. Ct. at 1478-79; *Weltover*, 112 S. Ct. at 2165. Thus, a foreign state "engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of a private player within' the market." *Nelson*, 113 S. Ct. at 1479 (quoting *Weltover*, 112 S. Ct. at 2166). Furthermore, the FSIA unmistakably commands that the

[13] It is important to note that the District Court rendered its decision prior to this Court's decision in *Nelson, supra*, which clarified the "commercial activities" exception.

commercial character of activity must be determined by reference to its "nature" (*i.e.*, the outward form of the conduct that the foreign state performs), rather than its "purpose" (*i.e.*, the reason why the foreign state engages in the activity). 28 U.S.C. § 1603(d); *Nelson*, 113 S.Ct. at 1479.

Applying these principles, the Court of Appeals utilized a "gravamen" test, which focuses on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 113 S. Ct. at 1477.[14] The Court of Appeals found that the gravamen of Petitioners' claims was "the essentially judicial role of the Committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors," including those of Petitioners. PA 24a-25a. Petitioners seek to shift the focus away from the judicial (sovereign) acts on which their claims are based to unrelated activity (the interim operation of certain Galadari businesses pending their liquidation) which had nothing to do with establishing the elements of the claims asserted by them.

The Court of Appeals also followed the *Nelson* and *Weltover* instruction that a sovereign engages in commercial activity when it engages in activities that could have been conducted by private parties. The Court of Appeals found that "[n]either the resolution of creditors' claims against the Galadari estate nor the determination of which [UBME] creditors held valid security interest in that bank constituted activity that could have been performed by private parties." PA 26a. Thus, the relevant "acts" upon which Petitioners' claims are based were found to be sovereign and not commercial.

Finally, Petitioners' analysis of *Weltover* is wrong. Thus, their assertion that in *Weltover*, a decision under

---

[14] In *Nelson*, this Court referred to opinions of the courts of appeals which had applied the gravamen test. *Nelson*, 113 S. Ct. at 1477.

the third clause of § 1605(a)(2), "jurisdiction existed over the government of Argentina where Argentina's *sovereign* act of rescheduling certain debts was undertaken in connection with commercial activity", Refco Pet. at 15 (emphasis added), Drexel Pet. at 18-19, contradicts this Court's holding in *Weltover* that Argentina was engaged in commercial, not sovereign, activity. Moreover, Petitioners' assertion flatly contradicts this Court's language in *Nelson*, where, in describing its holding in *Weltover*, this Court stated "just last term in *Weltover, supra*, which involved Argentina's unilateral refinancing of bonds it had issued under a plan to stabilize its currency . . . [we held] the refinancing to be a commercial activity for purposes of the [FSIA]." *Nelson*, 113 S. Ct. at 1478. Thus, the "act" upon which the claim in *Weltover* was based was the breach of a commercial contract by the government of Argentina.

B. The Court of Appeals Correctly Construed the Third Clause of the Commercial Activities Exception.

Petitioners' contention that the Court of Appeals misapplied the third clause of the commercial activities exception, which applies when "*the action* is *based . . . upon an act* outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that *act* causes a direct effect in the United States", is incorrect. 28 U.S.C. § 1605(a)(2) (emphasis added). Petitioners' construction of the third clause would extend it to include claims based on sovereign acts, *i.e.*, the adjudication of claims by a judicial and quasijudicial agency of a foreign state, by attempting to relate those sovereign acts to purported commercial activity which has only an attenuated and tangential connection at best. This construction of the third clause of the commercial activities exception is unwarranted and contradicts the restrictive theory of sovereign immunity codified in the commercial activities exception.

The Court of Appeals correctly applied the third clause of the commercial activities exception by finding that the "acts" upon which Petitioners' claims were "based" were the Committee's adverse determination of their claims in the Galadari insolvency proceedings, which was sovereign activity. PA 24a-25a. It then dismissed Petitioners' assertion that these sovereign acts could be linked to "tangentially related commercial conduct in which the Committee or the Emirate *might* have engaged", PA 25a (emphasis added), in a sufficient manner to find a basis for jurisdiction within the commercial activities exception.[15] Thus, the Court of Appeals found that the tangential commercial activities to which Petitioners sought to relate the sovereign acts had such an attenuated connection with those sovereign acts that the exercise of jurisdiction was precluded. Furthermore, if it had held otherwise, the commercial activities exception "would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature." *Id.*

Contrary to Petitioners' assertions, the Court of Appeals did not hold that the *acts* upon which a third clause claim is based must be solely "commercial activity" or a "commercial act." Refco Pet. at 11; Drexel Pet. at 17. The Court of Appeals merely held, that the "act" upon which Petitioners' claims were based was sovereign, *i.e.* the adjudication of claims by the Committee in Dubai, and that the claims were not based on other activities which Petitioners had described below as "commercial activity." PA 24a-25a.

Nor did the Court of Appeals hold, as Petitioners contend, that the "commercial activity" referred to in the third clause of § 1605(a)(2) must cause "a direct effect" in the United States. Refco Pet. at 11; Drexel Pet. at 17.

---

[15] The Court of Appeals also stated that describing the tangential activity relied upon by Petitioners as "commercial" was "suspect". PA 24a, n.3.

Here, again, the Court of Appeals properly construed the third clause of § 1605(a)(2) by requiring that the *act* outside the territory of the United States, upon which the action was based, be the same *act* that caused a direct effect in the United States. In the Court of Appeals analysis that *act* was the adjudication of Petitioners' claims by the Committee in the Dubai insolvency proceedings. By contrast, Petitioners' contention rests on their argument, rejected by the Court of Appeals, that other activities described by them as "commercial" constituted the "act" upon which their claims were based. PA 24a-25a. Thus, the Court of Appeals' construction of the statute was consistent with the statutory language and with the decisions of this Court in *Weltover* and *Nelson*.

C. There Is No Conflict Among the Circuit Courts of Appeals.

The cases relied upon by Petitioners do not demonstrate a conflict among the Circuits. Indeed there is none. *See, e.g., Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 (D.C. Cir. 1990); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980).

Petitioners mislead the Court when they state that *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1291 (3rd Cir. 1993), "*held* that the 'third clause[] of the FSIA commercial activity section use[s] the 'in connection with' language, which arguably might allow for a more tenuous causal link between the claims alleged and the commercial activities [of the foreign sovereign]' ". Refco Pet. at 18 (emphasis added); Drexel Pet. at 20. In actuality, the Third Circuit held in *Federal Ins.* that jurisdiction did not exist under the third clause of the commercial activities exception because "the causes of action alleged in the lawsuit are not *substantively con-*

nected to the loan transaction." *Federal Ins.*, 12 F.3d at 1291 (emphasis added). This is similar to the analysis of the Court of Appeals below. PA 23a-26a.

Similarly, in *Stena Rederi A.B. v. Petroleos Mexicanos*, 923 F.2d 380, 388 (5th Cir. 1991), an analogous [16] "second clause" case, the Fifth Circuit held that a "material connection must exist between the act upon which the claim is based and the commercial activity to which it relates. In *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), the Eleventh Circuit specifically held that "in designing and manufacturing cars for sale, RNUR [the foreign government-owned defendant] acted *not in any governmental capacity*, 'but in the manner of a private player', no different from General Motors, Ford, or any privately held automobile manufacturer." *Id.* at 1544 (emphasis added). *Vermuelen* clearly does not authorize jurisdiction over sovereign acts when the sovereign engages in tangential commercial activity.

In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1812 (1993), the Ninth Circuit also noted that a "material connection" must exist between the plaintiff's cause of action and the act performed in the United States in analogous second clause cases. The Ninth Circuit did not reach a conclusion as to the applicability of the third clause exception but only remanded for further factual development on that issue. *Id.* at 711. *Siderman* in no way authorizes jurisdiction on the basis of tangential commercial activity.

---

[16] The second and third clauses of the commercial activities exception contain similar "in connection with" language.

III. THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI WITH RESPECT TO THE WAIVER ISSUE.

A. There Is No Conflict Among the Circuit Courts of Appeals as to the Legal Standard to Be Applied.

All the courts of appeals that have considered the matter are in complete agreement that the implied waiver provisions of 28 U.S.C. § 1605(a)(1) must be "narrowly construed", and that an implied waiver must be "unmistakable" and "unambiguous" and requires, at a minimum, a conscious decision to participate in litigation and waive immunity. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) ("Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly"); *Foremost-McKesson*, 905 F.2d at 444 (waiver requires a conscious decision to take part in litigation and thereby waive immunity); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (waiver exception narrowly construed); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987) (waiver exception "narrowly construed"), *cert. denied*, 485 U.S. 905 (1988); *Siderman*, 965 F.2d at 720 ("narrowly construed"). *See also Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (filing various motions, including motions to dismiss and to stay proceedings pending outcome of litigation in Chile, as opposed to responsive pleadings, did not waive sovereign immunity). Thus, there is no conflict among the Circuits as to the applicable law on implied waivers of sovereign immunity under the FSIA.

B. The Court of Appeals Correctly Construed the Implied Waiver Language of § 1605(a)(1) and Correctly Applied the Well-Recognized Legal Standard to Undisputed Facts.

The case law applying the legislative history emphasizes that an implied waiver by a party through the filing of a responsive pleading requires "a conscious decision to take a part in litigation and a failure to raise sovereign immunity despite the opportunity to do so." *Shapiro*, 930 F.2d at 1017; *Foremost-McKesson*, 905 F.2d at 443-44; *Frolova*, 761 F.2d at 378.

The Court of Appeals Decision [17] relied on this unified and substantial body of law in concluding that the record did not reveal an "unmistakable" or "unambiguous" implied waiver by the Committee of its sovereign immunity. PA 15a-21a.[18] The Court of Appeals emphasized

---

[17] It should be noted that the dissent in the Court of Appeals did not express any disagreement with the majority's analysis of the waiver issue.

[18] Petitioners' grandiose assertion that the Court of Appeals Decision on waiver "is at odds with every Federal decision on this issue" is wholly unsubstantiated. *See* Drexel Pet. at 11-12. None of the cases upon which Petitioners seek to rely support the proposition that a foreign state specifically appearing in a limited, representative capacity on behalf of non-immune defendants waives its own immunity with respect to unasserted future claims which do not even exist at that time. For example, in *Siderman*, a case upon which Petitioners seek to rely, the Ninth Circuit expressly noted that "the only material before [it] on the issue of waiver is that presented by the Sidermans", and that, in light of the allegations that Argentina had deliberately implicated U.S. courts in its persecution of the plaintiffs, there was a sufficient basis to remand the case to the district court for further proceedings on the waiver issue. *Siderman*, 965 F.2d at 720.

Similarly, Petitioners' reliance on *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 786 (2d Cir. 1980), *cert. denied*, 469 U.S. 1087 (1984), and *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 601 F. Supp. 457 (S.D. Fla. 1984), *rev'd on other grounds*, 792 F.2d 989 (11th Cir. 1986), is also misplaced. In

that the Committee's participation in the proceedings merely as the representative of the insolvency estates of two non-immune defendants simply could not constitute a conscious decision to waive its own defense to sovereign immunity as to future claims. Moreover, the Court of Appeals Decision properly concluded that "[h]owever its participation is regarded, the Committee consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived." PA 21a.[19]

Thus, the implied waiver language of § 1605(a)(1) was correctly interpreted and applied by the Court of Appeals and there is no special reason for this Court's exercise of its certiorari discretion.

III. THE PETITIONS SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION CAN BE SUSTAINED ON OTHER ALTERNATIVE GROUNDS.

There are several additional grounds which were not reached by the Court of Appeals, which support the dismissal of the Supplemental Complaints against the Emirate. These include the Act of State Doctrine and the doctrine of Judicial Immunity. Furthermore, although the Court of Appeals did not need to reach the issue of whether the Emirate was the "alter ego" of the Commit-

---

Venezolana, a foreign state agency, which had instituted the action and tried the merits of its own claims as well as the defendants' counterclaims, did not raise a sovereign immunity defense at all and the district court, therefore, *sua sponte*, concluded after trial that it had waived its sovereign immunity defense. In *Sea Lift*, the defendant did not raise the defense of sovereign immunity until the closing of arguments at the trial on merits.

[19] In any event, even if the Committee had waived its immunity, it is clear that the Emirate, which had no involvement in either lawsuit until it moved to dismiss on FSIA grounds, did not do so. *Bancec, supra.*

tee, the District Court's decision on this point was clearly erroneous. The courts below also did not consider the torts or takings exception to FSIA immunity which, in any event, would have precluded jurisdiction. Therefore, this Court need not exercise its discretionary jurisdiction to review the issues raised in the petitions.

A. The Act of State Doctrine Bars Petitioners' Claims.

Pursuant to this Court's decisions, the Act of State doctrine protects the challenged conduct of the Committee and the Emirate. This doctrine provides that

> every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 n.7 (1976) (citing *Underhill v. Hernandez*, 168 U.S. 250 (1897)). Similarly, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990), this Court stated:

> In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.

Id. at 405 (citations omitted). The Act of State doctrine "is a rule of decision under which an act meeting the definition . . . is binding on the court." *Allied Bank Int'l v. Banco Credito Agricola*, 757 F.2d 516, 520 (2d Cir.) (citations omitted), *cert. dismissed*, 473 U.S. 934 (1985).

The claims asserted against the Committee (and the Emirate) in the Supplemental Complaints are based on *acts which came to fruition* in Dubai, *i.e.*, the adjudication in Dubai of claims presented in Dubai for payment

in Dubai from assets located in Dubai, and thus fall within the Act of State doctrine. *Asociacian de Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1199-1200 (D.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

The Act of State doctrine is similarly applicable to Drexel's claims pertaining to the Emirate's acquisition of the UBME shares in which Drexel purportedly had a security interest. The Emirate was physically in the position to present a *fait accompli* with respect to the acquisition of the UBME shares, which were shares in a Dubai chartered bank, the legal situs of which was in Dubai. *See Banco Nacionale de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

B. Petitioners' Claims Are Barred by the Doctrine of Judicial Immunity.

Since the gravamen of the claims asserted in the Supplemental Complaints is the Committee's adjudication of Petitioners' claims in the Dubai insolvency proceedings, the Committee's activities are immune under the doctrine of judicial immunity as propounded by this Court. The 1984 Decree provided for such immunity for the Committee under the law of Dubai. EA 10a, ¶ 9. The U.S. law of immunity for judicial or quasi-judicial acts is no different. *See Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Butz v. Economou*, 438 U.S. 478, 513-17 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075, 1078 (9th Cir. 1986); *Winslow v. Romer*, 759 F. Supp. 670 (D. Colo. 1991) (bankruptcy judge entitled to absolute judicial immunity). Thus, the Committee's acts are entitled to judicial immunity and the Emirate should likewise be immune even if the acts of the Committee could be attributed to the Emirate.

C. The Emirate Was Not the "Alter Ego" of the Committee.

Even if subject matter jurisdiction existed under the FSIA with respect to the Committee (which it does not), no such jurisdiction would exist with respect to the Emirate unless the acts of the Committee can be attributed to the Emirate. This would apply whether a purported waiver or the commercial activity exception is at issue. To the extent that the District Court based the Emirate's liability on acts of the Committee, as its purported agent, it ignored settled precedent of this Court that an "agency or instrumentality" of a foreign state is *presumed* to be independent of the foreign state for purposes of attributing liability. *See Bancec*, 462 U.S. at 627-28. It is well recognized that this presumption of separateness "is not to be lightly overcome." *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987). *See also Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *Foremost-McKesson*, 905 F.2d at 444; *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989).

Despite the Emirate's submission of factually uncontroverted sworn declarations that the Emirate did not direct or control the Committee, the District Court (a) made no factual findings on the point, (b) did not even discuss the presumption of independence set forth in the *Bancec* case, (c) did not discuss what principles of agency law it was relying upon, and (d) merely stated in *ipse dixit* fashion that the Committee was the Emirate's agent and that, therefore, the Emirate was bound by the Committee's acts. The District Court's error on this point was an additional valid ground for reversal in the Court of Appeals with respect to claims against the Emirate.[20]

---

[20] Even if the essential act upon which the claims against the Emirate are based were not the Committee's adjudication of Petitioners' claims in 1991, any claims against the Emirate pertaining to its acquisition of the UBME shares or issuance of sovereign

D. Claims of Misrepresentation, Abuse of Process or Interference with Contractual Rights Are Barred by 28 U.S.C. § 1605(a)(5)(B).

The decisions below also did not need to address Petitioners' attempt to artfully recast (as "commercial activity") allegations of misrepresentation, interference with contract rights, and abuse of process—which are specifically designated as immune activity under § 1605(a)(5)(B). This Court has warned against pleading ploys designed to avoid the restrictions of the FSIA. *Nelson*, 113 S. Ct. at 1480. *See also Gregorian v. Izvestia*, 871 F.2d 1515, 1522 n.4 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Preston v. United States*, 596 F.2d 232, 238 (7th Cir.), *cert. denied*, 444 U.S. 915 (1979) (under analogous Federal Tort Claims Act, 28 U.S.C. § 2680(a)). Thus, Petitioners' claims based on misrepresentation, interference with contract rights or abuse of process are immune under the specific provisions of § 1605(a)(5)(B). *See Gregorian, supra.*

E. Claims Based on the Exercise of Discretion by the Committee Are Barred by 28 U.S.C. § 1605(a)(5)(A).

Moreover, the gravamen of Petitioners' claims, *i.e.*, the Committee's adjudication in Dubai, involved the quintessential exercise of discretion by a judicial or quasi-judicial

---

decrees in 1983 and 1984 would be time-barred. Since the FSIA does not contain a specific statute of limitations, federal courts will look to analogous state law. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *see Goodsons & Co. v. Federal Republic of Nigeria*, 558 F. Supp. 1204, 1207 (S.D.N.Y. 1983). Under any analogous New York limitations statute, Petitioners' claims would be time barred. *See* N.Y. Civ. Prac. L. & R. § 214.4 (McKinney's 1990) (actions "to recover damages for injury to property" must be commenced within three years); and § 213.1 (actions "for which no limitation is specifically prescribed by law" must be commenced within six years). Those claims would also be time-barred under the most analogous federal statute, the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (taking claims against U.S. government must be commenced within 2 years).

authority. Since the exercise of discretion is protected *even* if that discretion is abused under 28 U.S.C. § 1605 (a)(5)(A), the Committee's activities are immune.

F. The Takings Exception to the FSIA Is Not Applicable.

Petitioners' takings claims do not meet the requirements of the specific "takings" exception to sovereign immunity found in § 1605(a)(3) of the FSIA. Neither the District Court nor the Court of Appeals reached that issue, although it was briefed in both courts.[21]

Firstly, what was involved was an adjudication of claims filed in an insolvency proceeding, not a "taking" by a foreign state of property owned by aliens. Secondly, even if the unilateral acquisition of the UBME shares by the Emirate in 1983 could be viewed as a "taking", there was no taking in violation of international law, since the alleged taking was not discriminatory, there was proper compensation to those who proved their entitlement, and the acquisition was for a public purpose. *Siderman*, 965 F.2d at 711-12.[22] Thus, the acquisition of the UBME shares had the valid public purpose of preventing the failure of a Dubai-chartered bank and financial catastrophe in the region. *Drexel IV* at 10, findings of fact nos. 63 and 22, conclusion of law no. 21. Also, the Emirate paid more than adequate compensation for the shares to the Committee which, pursuant to the 1984 Decree, was to

---

[21] In this Court Petitioners appear to rely on § 1605(a)(2) and not on § 1605(a)(3).

[22] Moreover, "property" under the "takings" exception does not include intangible property rights, such as contract rights. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 274 (2d Cir. 1984).

pay such compensation to claimants demonstrating their entitlement thereto.[23]

Similarly, the Committee's adjudication, in 1991, that Holdings was not obligated to pay the contractual debts of Commodities and that Drexel had no valid security interest in the UBME shares, was a public act in furtherance of a public judicial purpose. Neither the Emirate's decrees nor the Committee's activities were discriminatory and did not single out the claims of any particular class or nationality of creditor, or, indeed, Drexel or Refco. Finally, the fact that the Galadari and Commodities insolvency estates are substantially without assets merely reflects a risk assumed in any commercial transaction and cannot constitute a taking without adequate compensation.

Finally, Petitioners also could not satisfy the jurisdictional nexus requirements of the "takings" exception which requires that the property taken (or any property exchanged for such property) must be either: (i) present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (ii) owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States. The Committee did not engage in any commercial activity in the United States. The Committee merely participated in the District Court to seek comity deference with respect to its own proceedings in Dubai. That does not constitute commercial activity.

---

[23] The District Court previously held that the only evidence adduced indicated that the UBME shares claimed by Drexel were "valueless" at the time the Dubai insolvency proceeding was instituted. *Drexel IV* at 10, finding of fact no. 62. Drexel admits in its Supplemental Complaint that the Emirate transferred "in excess of $20 million" to the Committee, which the Committee, according to the 1984 Decree, was to pay to claimants who could establish their rightful entitlement to the proceeds. EA 8a-9a.

CONCLUSION

The separate petitions of Drexel and Refco for a writ of certiorari to the Second Circuit should be denied in their entirety.

Respectfully submitted,

HAROLD BARRY VASIOS
Counsel of Record
ANJALI G. ASNANEE
ELIZABETH A. BERNEY
GILBERT, SEGALL AND YOUNG
430 Park Avenue
New York, NY 10022
(212) 644-4000
Attorneys for Respondent
The Emirate of Dubai,
United Arab Emirates

March 31, 1994

APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

28 U.S.C. §§ 1603-1605 provide in relevant part:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such prop-

erty is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

* * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights;

* * * *

TRANSLATION

Decree No. (3) of 1984
concerning the financial affairs
of Abdul Wahab Ebrahim Galadari

WE, Maktoum bin Rashid Al Maktoum, Crown Prince, Deputy Ruler of the Emirate of Dubai,

AFTER REVIEWING Decree No.5/83 issued on 12 November 1983 concerning the Union Bank of the Middle East Limited (hereinafter referred to as the "Bank") and Decree No.6/83 issued on 26 November 1983 amending Decree No. 5/83,

AND in order to protect the rights of all those concerned with the financial affairs of Abdul Wahab Ebrahim Galadari,

HEREBY DECREE as follows:

1. A committee of receivers shall be established comprised of the following persons:

   (1) Abdulla Hassan Al Rostamani

   (2) Hassan Ibn Al Sheikh

   (3) Abdulla Lootah

   (4) Nabil Aref

   hereafter referred to as the "Committee".

The Quorum necessary at meetings for the passing of decisions by the Committee shall be a majority of the foregoing persons present in person. Decisions at meetings of the Committee shall be passed by a simple majority of those present.

2. In this Decree, the following terms shall, unless the context otherwise requires, have the meanings set out opposite each of them:

"Mr. Galadari" means Abdul Wahab Ebrahim Galadari;

"Galadari Assets" means all assets of any kind belonging to Mr. Galadari both moveable and immoveable and situated within and outside the United Arab Emirates including but not limited to the following:—

(a) all shares owned by Mr. Galadari in any incorporated companies;

(b) all interests owned by Mr. Galadari in any partnerships;

(c) all assets of any businesses including the goodwill thereof owned by Mr. Galadari;

(d) all personal effects and all other assets of any kind owned by Mr. Galadari;

(e) all assets which are owned by Mr. Galadari, but which are held and/or registered in the name of a third party as nominee;

(f) all assets of the kind set forth in paragraphs (a) to (e) above which have been transferred or otherwise disposed of without full consideration by Mr. Galadari to any person during the period of three years expiring on the date of this Decree.

"Galadari Companies" means:

(a) each incorporated company of which Mr. Galadari directly or indirectly (i) owns a majority of the issued shares carrying the right to vote at a general meeting thereof or (ii) is entitled to appoint a majority of the directors or (iii) has the right to manage the affairs;

(b) each partnership of which Mr. Galadari or any company included under Sub-Article (a) of this definition owns directly or indirectly an interest; and

(c) each business establishment which is owned directly or indirectly by Mr. Galadari.

PROVIDED THAT neither the Bank nor any company in which the Bank is the owner of shares at the date of this Decree shall for the purposes of this Decree be regarded as a Galadari Company nor any shares in the Bank as a Galadari Asset.

"Secured Debts" means debts secured by Galadari Assets and/or assets owned by Galadari Companies and/or the Bank Shares (as hereinafter defined) as follows:

(a) lands and any buildings thereon, if the security taken is by way of registered legal mortgage;

or

(b) assets other than those stated in the preceding paragraph, if the security taken is:

(i) by way of a notarised mortgage document; and

(ii) the mortgaged assets are in the possession of the mortgagee; and

(iii) registered if capable of registration.

3. As of the date of this Decree, Mr. Galadari ceases to have the right or power to deal with his financial affairs directly or indirectly including but not limited to the right to manage, sell, purchase or encumber any asset, to pay or receive monies, to incur obligations, or to bring or defend any legal proceedings in any court or tribunal.

4. For the purposes of this Decree, all the Galadari Assets are hereby vested in the Committee and the Committee shall also be entitled to receive the proceeds of the shares of the Bank owned by Mr. Galadari or any of the Galadari Companies (hereinafter called the "Bank Shares") PROVIDED THAT all rights in respect of the Bank Shares including the

power to sell the Bank Shares but excluding the right to receive the proceeds thereof shall be vested in the Provisional Board of the Bank (hereinafter called the "Provisional Board").

5. The Committee is empowered without the need to comply with any of the formalities contained in the relevant constituting documents to appoint any of it own members and/or delegates as directors of those Galadari Companies of which Mr. Galadari directly or indirectly would be entitled to appoint all or any of the directors, in place of the directors thereof appointed prior to the issue of this Decree.

6. Payment of all debts incurred by Mr. Galadari or those of the Galadari Companies established in the United Arab Emirates which arise from transactions entered into up to close of business on 23 November 1983, being the date on which the Provisional Board assumed control of the Galadari Assets, shall be held in suspense, pending the orderly realisation of all assets. No interest shall accrue whether before or after the issue of this Decree on such debts except bank, contractual or court interest which shall accrue at the rate agreed or as decided by the Court excluding penalty interest.

7. The Committee shall have power notwithstanding any restrictions contained in any of the constituting documents of the Galadari Companies:

   (a) Without prejudice to the provisions of Article 12 of this Decree to bring or defend any legal proceedings on behalf of Mr. Galadari or any Galadari Companies or in relation to Galadari Assets;

   (b) to terminate or to carry on and manage the respective businesses of the Galadari Companies so far as may be necessary for the sale of the Galadari Assets and/or Galadari Companies;

(c) to meet and pay all obligations entered into into since 23 November 1983 including the costs of management of the Galadari Companies and Galadari Assets;

(d) to require creditors to submit claims in such form, accompanied by such proofs, and within such period as the Committee shall determine;

(e) to admit claims in whole or in part and to make any compromise or arrangement with creditors or persons having any claims, present or future, against any Galadari Companies, Galadari Assets or Mr. Galadari;

(f) to compromise debts and liabilities owed to Mr. Galadari, the Galadari Companies and Galadari Assets;

(g) to sell the Galadari Assets and assets owned by the Galadari Companies with power to transfer the same to any person;

(h) to sign and deliver all necessary documents and do all such other acts and things as they deem necessary for the beneficial disposal of the Galadari Assets and assets owned by the Galadari Companies;

(i) where Secured Debts are owed to creditors, to assume control and to dispose of the assets charged by way of security for the Secured Debts (other than the Bank Shares) and to apply the proceeds of each such asset including each charged Bank Share in the following order:

(1) liabilities and expenses incurred by the Provisional Board and/or the Committee after 12 November 1983 in connection with such assets;

(2) fees and taxes of the Dubai and the United Arab Emirates Governments imposed in respect of such assets;

(3) salaries and other entitlements of employees in respect of a Galadari Asset or a Galadari Company owning such assets;

(4) distributions to the secured creditors up to the amount of the debt secured on that asset;

(5) the balance of the proceeds, if any, in the manner set out in Sub-Article (j) below;

(j) to distribute the proceeds separately of realisations from the assets not included under Sub-Article (i) above of each Galadari Company to its creditors and proprietors and the Galadari Assets or the proceeds thereof not included under Sub-Article (i) above to their respective creditors and proprietors by applying the same in the following order:

(1) liabilities and expenses incurred by the Provisional Board and/or the Committee after 12 November 1983 other than payments made under Sub-Article (i) above;

(2) fees and taxes of the Dubai and the United Arab Emirates Governments incurred other than payments made under Sub-Article (i) above;

(3) salaries and other entitlements of employees other than payments made under Sub-Article (i) above;

(4) debts incurred prior to 24 November 1983 on a pro rata basis up to the amount of such debts;

(5) distributions to proprietors, PROVIDED THAT if there is a surplus in respect of Galadari Assets after discharging all lia-

bilities of Mr. Galadari, debts remaining unpaid to creditors of Galadari Companies as at 23 November 1983 shall be discharged on a pro rata basis up to the amount of such debts, prior to a distribution to Mr. Galadari.

(k) to appoint such advisors and agents, and delegate such of the powers hereby granted to the Committee under this Article other than Sub-Article (e) hereof, as the Committee shall think necessary from time to time;

(l) to exercise such of the powers hereby granted to it in relation to Mr. Galadari, the Galadari Assets and assets owned by the Galadari Companies situated outside the United Arab Emirates as shall be acceptable under the relevant law;

8. All acts done or omitted to be done by the Provisional Board, their advisors Messrs. Peat, Marwick, Mitchell & Co and their Partners, and other delegates of the Provisional Board, from 12 November 1983 up to the date of this Decree on their own behalf or on behalf of Mr. Galadari, and in relation to the Bank, the Bank Shares, the Galadari Assets and the Galadari Companies, are hereby ratified and confirmed as of the date of such acts or omissions. The aforesaid persons shall not be personally liable for acts they have done or not done during the said period in respect of the said matters.

9. No liability personal or otherwise shall attach to the Provisional Board, the Committee, or their advisors and agents, or the Judicial Committee hereinafter referred to, in respect of acts performed in accordance with this Decree.

10. All rights accruing to and obligations incurred by the Provisional Board in connection with Mr. Gala-

dari, the Galadari Assets and the Galadari Companies (including but not limited to the costs of management thereof) since 12 November 1983, are hereby transferred to and assumed by the Committee.

11. The Committee shall keep proper books of account during the period from 24 November 1983 until the disposal of all Galadari Assets and shall prepare an account of receipts and payments as at 23 November each year and upon the termination of their appointment.

12. (a) All actions or proceedings of any kind instituted in Dubai prior to the date thereof in respect of Mr. Galadari, the Galadari Companies, the Galadari Assets or the Bank Shares, are hereby stopped.

(b) All attachments and orders for attachment obtained in the Dubai Courts or elsewhere against Mr. Galadari, the Galadari Companies, the Galadari Assets or the Bank Shares, and enforceable by the Dubai Courts and their respective Execution Departments, are hereby vacated.

(c) No action, attachment or proceeding shall be permitted to be instituted against Mr. Galadari, the Galadari Companies, the Galadari Assets, or the Bank Shares with effect from the date of this Decree.

(d) The enforcement by the Dubai Courts and their respective Execution Departments of all judgments and orders obtained in the Dubai Courts or elsewhere against Mr. Galadari, the Galadari Companies, and the Galadari Assets or the Bank shares, is hereby stopped.

(e) All cases and applications which have already been instituted and all judgments or orders which have been obtained in Dubai Courts

against Mr. Galadari, the Galadari Companies, the Galadari Assets, or the Bank Shares, shall be transferred by the Dubai Courts to the Committee and any claims after the issue of this Decree shall be submitted directly to the Committee.

(f) The Committee is hereby empowered to issue decisions which shall be in writing and shall have the effect of an order or judgment.

13. A judicial committee shall be established comprised of the following persons:

1. Hassan Ismail Qasim

   Deputy President of the Supreme Court of Appeal, Dubai

2. Saeed Juma Al Naboodah

   Chairman, Dubai Chamber of Commerce and Industry

3. Majid Hamad Rahma Al Shamsi

hereinafter called the "Judicial Committee".

All members shall be present in person at hearings, and all decisions by the Judicial Committee shall be passed unanimously or by a majority and issued in writing.

14. (a) Any creditor or other person having a claim against Mr. Galadari, the Galadari Companies, the Galadari Assets or Bank Shares may appeal to the Judicial Committee against any decision issued by the Committee within thirty days from the issue of such decision provided such appeal shall only be in relation to the amount claimed and the validity of any security connected therewith.

(b) The ruling of the Judicial Committee, after hearing the appellant and the Committee, shall be in writing and shall be final and absolute.

(c) The Judicial Committee shall have the power to award costs in its discretion.

15. Any final decision of the Committee or the Judicial Committee in favour of the Committee may be executed by the Committee and no other person through the Execution Department of the Dubai Courts.

16. Subject to the provisions of this Decree the Judicial Committee shall comply with the laws in force in Dubai.

17. This Decree shall come into force from the date of its issue and shall be published in the Official Gazette.

Maktoum bin Rashid Al Maktoum
Crown Prince, Deputy Ruler of Dubai

Issued on 17th April, 1984 A.D.
Corresponding to 17th Rajab, 1404 A.H.